IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05/02/2003

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THE HONOURABLE MR. JUSTICE P.K.MISRA

WRIT PETITION No.42580 of 2002 and WRIT PETITION No. 47102 of 2002

M/s.JAN DE NUL N.V.
represented by its Area Manager
and Finance Controller Guy Baeyens
South Asia JDN Group of Companies
435, 11th Main Road, RMV Extension,
Sadashiva Nagar,
BANGALORE 560 080. .. Petitioner in WP 42580/2002

Commissioner of Customs,
Custom House,
Tuticorin-628 004. .. Petitioner in WP 47102/2002

-Vs-

1.The Deputy Commissioner of Customs,
Custom House,
Tuticorin.
2.The Commissioner of Customs,
Custom House,
Tuticorin. .. Respondents in WP 42580/2002

1.M/s.Jan De Nul N.V.,
rep., by its Area Manager,
South Asia JDN Group of
Companies, 435, 11th Main
Road, RMV Extension,
Sadashiva Nagar,
Bangalore-560 080.
2.Customs Excise and Gold
(Control) Appellate Tribunal,
South Zonal Bench,
Chennai-600 006. .. Respondents in WP 47102/2002

Writ Petition No.42580 of 2002 is filed under Article 226 of the Constitution of India praying for the issue of a Writ of Mandamus for the reasons stated in therein and the Writ Petition No.47102 of 2002 is filed under Article 226 of the Constitution of India praying for the issue of a Writ of Certiorari for the reasons stated therein.

For petitioner in WP 42580/02: Mr.K.Alagirisamy, Senior

Counsel for Mr.K.Govi Ganesan
For petitioner in WP 47102/02: Mr.T.S.Sivagnanam,
Addl. Central Govt. Standing
Counsel.
For Respondents in WP 42580/02:Mr.T.S.Sivagnanam,
Addl. Central Govt. Standing
Counsel.
For Respondents in WP 47102/02:Mr.K.Alagirisamy, Senior
Counsel for Mr.K.Govi Ganesan

:O R D E R
Heard the learned counsel appearing for the parties.
2. The Writ Petition No.42580 of 2002 has been filed seeking for a direction for implementation of the order passed by the second respondent dated 30.9.2002. More particularly, the petitioner in the said writ petition has prayed that the bank guarantee No.18 of 1999 should be cancelled after payment of the custom duty to be quantified pursuant to the order of the appellate authority dated 30.9.2002. The connected writ petition No.47102 of 2002 has been filed by the department against the order passed by the CEGAT rejecting the application for staying the operation of the order dated 30.9.2002 passed by the appellate authority.
3. If the writ petition filed by the department would be allowed and stay as prayed for by them would be granted, the question of implementing the order passed by the appellate authority would not arise at this stage. On the other hand, if the writ petition filed by the department is decided against the department, the order passed by the appellate authority should be given effect to. In such view of the matter, it is more appropriate to take up first the writ petition filed by the department.
4. Learned counsel appearing for the petitioner (the department) has submitted that the appellate authority namely, CEGAT after having entertained the appeal filed by the department against the order of the first appellate authority should not have rejected the stay petition on the ground that the provision of law under which the stay petition having been filed has not been indicated. On going through the order passed by the CEGAT, rejecting the prayer for stay, it is of course, seen that the CEGAT has observed that the provision of law under which the stay petition has been filed has not been indicated. However, this does not appear to be the only reason, nor even the primary reason for rejection of the stay petition. A perusal of the subsequent portion of the order passed by the CEGAT clearly indicates that the CEGAT was of the view that no prima facie case has not been made out by the department before the CEGAT for granting stay of the order of the appellate authority.
5. The question of stay is essentially a question of discretion. Even though one of the grounds indicated by the CEGAT namely, the provision of law had not been indicated, appears to be unjustified, the main reason for rejecting the stay petition is the finding to the effect that the prima facie case has not been made out. While considering a Writ of Certiorari, it cannot be said that there is any error of law apparent on the face of record so far as this conclusion is concerned.
6. That apart, it appears that the bank guarantee in question was given by the petitioner in the W.P.No.42580 of 2002, pursuant to the

direction given by High Court in WPMP 25402 of 1999 arising out of W.P.No.9107 of 1999, by order dated 2.11.1999, the relevant portion of which is extracted hereunder:-

"....Therefore, in the absence of any order of duty liability against the petitioner and the assessment pending as per the remand order by the CEGAT the interest of the revenue can be safeguarded and the interest of the petitioner also can be taken care of by modifying the order in the above writ petition No.9107 of 1999 dated 2.11.1999 and permitting the petitioner to leave the Tuticorin Port as prayed for subject to the following conditions:-

(1) Petitioner shall furnish a Bank Guarantee in any one of the Nationalised Banks for a total sum of Rs.16,40,000/-.

(2) This Bank Guarantee shall be kept alive till the assessment is complete.

(3) This Bank Guarantee is subject to the orders passed by the Assessing Officer, and any further orders that the petitioner may obtain, before the appellate authority". (Emphasis added)

The emphasised portion makes the intention of the order very clear. It does not envisage giving of any further bank guarantee at the instance of the department. Keeping in view the conditions imposed, I do not think it would be proper at this stage, to call upon the writ petitioner in WP No.42580 of 2002 to furnish a fresh bank guarantee or keep alive the bank guarantee which has expired in the meantime, merely because an appeal has been entertained by the CEGAT.

7. Keeping in view of these aspects, I do not find any scope to interfere with the order passed by the CEGAT refusing to grant stay. Once such a conclusion is reached it goes without saying that the order passed by the first appellate authority is required to be complied with. Therefore, it is directed that subject to payment of the amount to be assessed as per the decision of the first appellate authority, the bank guarantee in question shall stand revoked. The Bank Guarantee in question shall be returned within

a period of seven days from the date of deposit of the amount to be assessed pursuant to the order of the first appellate authority. Such assessment may be done within a period of three weeks from today.

8. The learned counsel for the department, further submitted that the CEGAT had fixed a early date for hearing, but the matter could not be taken up as one of the judicial member was on long leave. It is stated at the bar that in the meantime alternative arrangement has been made. In such view of the matter the CEGAT is directed to take up the matter at an early date and dispose of the same in accordance with law as expeditiously as possible preferably before end of March 2003 . The writ petitions are disposed of accordingly. Consequently, connected WPMPs 68318 and 62806 of 2002 are closed.

Index: Yes.
Internet:Yes.
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To

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